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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 632

TRIUMPH EXPLOSIVES, INC., formerly known as and sued herein as TRIUMPH FUSEE & FIREWORKS COMPANY, LTD. (a Maryland corporation),

Petitioner,

vs.

OSCAR GIUSTI,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals for the Ninth Circuit.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals, filed and entered on June 27, 1946, appears in the record (R. 106) and is reported at 156 F(2d) 351 under the title, Giusti v. Pyrotechnic Industries, Inc., a corp., et al.

JURISDICTION.

Petitioner seeks to invoke the jurisdiction of the above entitled Court under Sec. 347 of Title 28 of the United States Code.

QUESTIONS INVOLVED.

The real issues involved are:

(1) Was petitioner "found" through a "finding by consent" for jurisdiction purposes in the instant action?

(2) Did petitioner's withdrawal from California operate to revoke such consent?

STATUTES INVOLVED.

A.

Section 15 of Title 15 of the United States Code provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is *found* or has an agent. without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Italics ours.)

Section 22 of Title 15 of the United States Code provides:

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be *found* or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be *found.*" (Italics ours.)

B.

The pertinent sections of the Civil Code of California, as far as material, provide:

Sec. 411. "Surrender of right to transact intrastate business. A foreign corporation which has qualified to transact business in this state may surrender its right to engage in such business within this state by filing in the office of the Secretary of State a certificate executed and acknowledged by its president or vice-president and secretary or treasurer, setting forth:

(1) That it surrenders its authority to transact intrastate business in this state.

(2) That it consents that process against it in any action upon any liability or obligation incurred within this state prior to the filing of the Certificate of Withdrawal may be served upon the Secretary of State.

(3) A Post Office address to which the Secretary of State may mail a copy of any process against such corporation that may be served upon him.

The surrender of authority to transact business in this state shall not affect any action pending at the time. The mere retirement from transacting business within this state without filing a

certificate of withdrawal shall not revoke the appointment of any agent upon whom process may be served within this state."

Sec. 406(a) (Last paragraph thereof) *"Corporations that have withdrawn.* A foreign corporation which has transacted intrastate business in this state and has thereafter withdrawn from business in this state may be served with process in the manner provided in this section in any action brought in this state arising out of such business, whether or not it has ever complied with the requirements of Section 405, Civil Code." (Sec. 405 specifies certain prerequisites for admission included in which is the requirement that a written designation of agent and copy of its charter be filed.)

The word "liability" as used in Section 411 applies to actions sounding in tort as well as for breach of contract.

Tingley v. Times-Mirror Co., 144 Cal. 205;
Miller & Lux v. Kern Co. L. Co., 134 Cal. 586.

SIMILAR STATUTES.

A.

Section 51 of the Judicial Code (28 U.S.C. 112), provides as far as pertinent:

"* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the

jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant; except that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found."

B.

Sec. 216, Subd. 1, par. E, of the New York Statutes, respecting the withdrawal of foreign corporations, provides:

"That it consents that process against it in an action, or proceeding upon any liability or obligation incurred within this state before the filing of the certificate of surrender of authority, after the filing thereof, may be served upon the Secretary of State."

THE FACTS OF THE CASE.

Respondent filed an action in the United States District Court at San Francisco against petitioner, a corporation organized under the laws of the State of Maryland, and sued herein as Triumph Fusee & Fireworks Company, Ltd. (R. 12-13), and other named fireworks manufacturers on November 13, 1944 (R. 12) under 15 U.S.C. 15 (Anti-Trust Law) to recover

damages for injury to the wholesale fireworks merchandise business, which he had been engaged in at said place, resulting from (1) a conspiracy between petitioner and other defendants to destroy said business and (2) the overt acts alleged to have been done pursuant thereto.

It is admitted that a copy of the summons and complaint herein was delivered to the Secretary of State of the State of California on December 8, 1944. (R. 46-47.) The delivery thereof constituted service of process herein upon petitioner as prescribed by California Civil Code, Section 406(a).

Liquid Veneer Corp. v. Smuckler (CCA 9), 90 F. (2d) 196;

Union Pac. Co. v. Novak (CCA 9), 61 F. 573.

On March 7, 1945, petitioner appeared specially in a motion to (1) quash the summons, and (2) quash the service thereof. In an affidavit (R. 15) by one of the attorneys for petitioner, which was served and filed on said day (R. 19), it was stated (1) that at the time of the delivery of the said copies to the Secretary of State on December 8, 1944, said corporation was not doing business in California, (2) that petitioner qualified to do business therein on January 2, 1940, and thereafter did, on December 7, 1943, file a withdrawal certificate with said Secretary of State pursuant to California Civil Code, Section 411, and since said time has not transacted business therein, intrastate or otherwise. It concluded with a wherefore paragraph which repeated the prayer thereto-

fore made in the motion and asked in addition that the action as to petitioner be dismissed.

Said motion came on regularly for hearing on March 26, 1945 (R. 45 and Docket Entries R. 95), at which time respondent filed two counter affidavits, one made by him, the other by his counsel. (R. 45, 19, 23.) Facts stated in said affidavit were in conflict with those stated in petitioner's said affidavit. Consequently there was thus raised the question of whether petitioner was also transacting its business in California prior to the day on which petitioner filed its qualifying papers in California, to wit, January 2, 1940, and as early as the year 1935. (R. 59, 54-57.)

At the hearing one witness testified orally. (R. 66.) He was called by respondent and testified that Kindel & Graham (1058 Mission Street, San Francisco, California), of which he is a partner, commenced in the spring of 1938 to do business with the petitioner by placing an order with petitioner which was filled by direct shipment from petitioner's plant in Maryland to San Francisco (R. 67), and that subsequently, in 1938, petitioner opened a warehouse in Oakland (R. 67), from which place orders, thereafter taken in San Francisco, were filled. (R. 68.) Subsequently three additional affidavits were filed by petitioner. (R. 83, 26, 28, 31.) One of them, the affidavit of Mary Bell averred in effect that she conducted her fireworks business at Culver City, California, under the name of Culver City Fireworks Company; that she did not solicit any business in the name of petitioner or act for it in any capacity; that the full extent of her con-

nection with petitioner prior to the spring of 1939 was in that, from 1934 and earlier and up to and through 1938, she, acting for Culver, sent orders for fireworks to Triumph at its Maryland office, and said orders were filled from said place and sent to Culver in California, and Culver paid, upon Triumph's factory terms, by sending its check to Triumph to its office in Maryland. (R. 30.) Her affidavit was in response primarily to that portion of respondent's affidavit (R. 23-26) which recited facts, to wit, that respondent had written to petitioner on April 20, 1935 for information and prices covering its products and had received the following reply thereto from petitioner's president:

"Elkton, Maryland
April 23rd, 1935

Dear Mr. Giusti:

I want to assure you that our line is not only the best finished line on the market, but also unsurpassed as to quality. We are making some exclusive items which have proven to be very ready and profitable sellers, and inasmuch as it is too late for direct shipment from here to your City, I would advise you to communicate with the Culver City Fireworks Company, Culver City, Cal., who handle our line exclusively, and they will be very glad to take care of anything you may want.

I make a trip to the Pacific Coast once a year, and will not fail to look you up next October or November.

Very truly yours,
/s/ J. B. Decker"

and that on May 23, 1935, affiant received the following Western Union Telegraph message from said Mary Bell, owner of Culver City Fireworks Company, to wit:

> "Best Discount off triumph catalogue is thirty per cent FOB Culver City."

At the conclusion of said hearing, the said motion was ordered submitted. (R. 88, 44.) On June 19, 1945, the trial Court made and entered its order quashing service of summons and dismissing this action as to petitioner. (R. 88-89.)

On September 5, 1945, notice of appeal from said order was filed by respondent.

Said order is appealable.

28 U.S.C. 225;

In re Melekov (CCA 9), 114 F. (2d) 727;

Wisconsin Co. v. Western Fire Co. (CCA 7), 107 F. (2d) 402.

ARGUMENT.

PETITIONER WAS "FOUND" IN THE FORUM AT THE TIME WHEN SUMMONS AND COMPLAINT WAS SERVED ON THE SECRETARY OF STATE, AND PETITIONER WAS THEREFORE AMENABLE TO THE PROCESS OF THE LOWER COURT IN THIS ACTION UNDER 15 U.S.C. 22.

I.

PETITIONER CONSENTED TO BE "FOUND" IN CALIFORNIA WHEN IT COMPLIED WITH THE CALIFORNIA STATUTE GOVERNING THE ADMISSION OF FOREIGN CORPORATIONS.

Petitioner's argument is quite unsound. The fallacy of it lies in the fact that petitioner has deliberately eliminated or disregarded a very important element in the facts of the case. The missing fact is that petitioner filed the necessary papers with the Secretary of State (California) to qualify it to conduct its business in said state. This missing fact together with the character of the bulk of the cases cited by it to support its argument is indicative of petitioner's attitude toward the decision in *Nierbo v. Bethlehem Corp.*, 308 U.S. 165, 60 Sup. Ct. 153, 84 L. Ed. 167. Petitioner is evidently not yet willing to accept the law as laid down in said decision. When it is ready to accept the law as there laid down, petitioner will know that there is a vast difference between a "finding through consent" and "a finding through doing business."

Petitioner, by appointing an agent for the service of process in compliance with California Civil Code 405, thereby consented to be sued in California upon transitory causes of action.

Nierbo v. Bethlehem Corp., 308 U.S. 165.

Such consent applies to actions in the Federal Courts as well as those in State Courts and to actions therein which are based on Federal law.

Oklahoma Packing Co. v. Oklahoma Gas & Elec., 100 Fed. (2d) 770 (approved in the *Nierbo* case, supra).

The fact that petitioner was "found" in California, satisfied the jurisdictional requirement, notwithstanding the "finding" was procured by said consent.

Ex parte Schollenberger, 96 U.S. 369, 377, 24 L. Ed. 853 (also approved in the *Nierbo* case, supra).

The essential thing is the finding, beyond which the Court will not ordinarily look.

Ex parte Schollenberger, supra.

It thus appears that the numerous authorities cited in petitioner's brief, which specify the amount of business which shall be done in the invaded state in order to constitute "doing business" are wholly irrelevant to the facts before us.

While it is true that the Court, in the *Nierbo* case, dealt only with the word "found" as used in Sec. 51 of the Judicial Code, supra, the decision, nevertheless, applies with equal force to the word "found" as used in 15 U.S.C. 22, supra. If there appears to be any doubt about it we need only to examine the authorities which relate to it. But, before doing so, we desire to digress momentarily to ascertain, for introductory purposes only, what difference, if any, exists, between the two statutes referred to, when the factual

situation shows no attempt on the part of the foreign corporation to meet the statutory requirements of the invaded state.

In 1914, Congress relieved the injured person from the requirement that he sue only in the district where the foreign corporation defendant resides or is found, by requiring merely that said corporation transact business there of some degree or character less than that of "doing business". To constitute "transacting business" it is not essential that agents be sent into the forum to act for the foreign corporation. It is sufficient if goods are shipped into the state upon orders which originate solely through a mail correspondence, from retail customers.

Jeffrey Co. v. Hupp Motor Co. (CCA 1), 46 F. (2d) 623, reversing 41 F. (2d) 767.

In the *Jeffrey* case the Court said, at page 624:

> "Prior to the enactment of October 15, 1914, c. 323, Sec. 12, 38 Stat. 736 (15 USCA Sec. 22), a person or corporation violating the anti-trust laws could only be sued in the district where resident, or where found. The provision of section 12 of the Clayton Act relieved 'the injured person from the necessity of resorting for the redress of wrongs committed by a nonresident corporation, to a district, however distant, in which it resides or may be found'—often an insuperable obstacle—and enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation in fact transacts business, and bring it before the court by the service of process in a district in which it re-

sides or may be 'found'." *Eastman Co. v. Southern Photo Co.,* 273 U.S. 359, 373, 374, 47 S. Ct. 400, 403, 71 L. Ed. 684; *Gen. Inv. Co. v. Lake Shore Rwy.,* 260 U. S. 261, 279, 43 S. Ct. 106, 67 L. Ed. 244.

'A corporation is engaged in transacting business in a district, within the meaning of this section (section 22), in such sense as to establish the venue of a suit—although not present by agents carrying on business of such character and in such manner that it is "found" therein and is amenable to local process—if in fact, in the ordinary and usual sense, it "transacts business" therein of any substantial character.' *Eastman Co. v. Southern Photo Co.,* supra."

We now return to the construction given to the word "found".

The right of action given by Section 15 of Title 15 U.S. Code, is an action at law, and is maintainable only if resulting actual damage to business or property takes place.

Gibbs v. McNeeley (CCA 9), 102 F. 594;
Noyes v. Parsons (CCA 9), 245 F. 689;
Northwestern Oil Co. v. Socony Co. (CCA 7), 138 F. (2d) 967.

To determine the meaning of the word "found" contained in Section 22 supra, the Court will resort to the decisions construing Section 51 of the Judicial Code (supra).

Michigan Alum. Co. v. Alum. Casting Co. (CCA 6), 190 F. 879.

Thus it appears that the definition of the word "found" is exactly the same in each instance. The *Nierbo* case is thus applicable to both statutes. Petitioner therefore is required to meet the decision in the *Nierbo* case squarely. No opportunity for avoiding it is present.

II.

PETITIONER'S "WITHDRAWAL" FROM CALIFORNIA DID NOT OPERATE TO REVOKE THE CONSENT TO BE "FOUND" THERE FOR THE PURPOSE OF THE INSTANT ACTION.

At this point it is well to remind ourselves of the rule now firmly established that where "consent to be found" has been thus given, the Court will not ordinarily interest itself in the amount or character of business either then or thereafter done by the foreign corporation in the state where such qualifying occurred. By doing so, we more readily perceive that the only possible cause which would exist for examining into the character of the business of petitioner would be that which appears by reason of the wording of the California statutes governing the "withdrawal" of foreign corporations.

California Civil Code Section 411, supra, requires the filing of a written statement by petitioner. This was done. (R. 18.) Paragraph (2) of said section provides:

> "That it consents that process against it in any action upon any liability or obligation incurred within this state prior to the filing of the Certificate of Withdrawal may be served upon the Secretary of State."

The word "liability" as used in Section 411 applies to actions sounding in tort as well as for breach of contract.

Tingley v. Times-Mirror Co., 144 Cal. 205;
Miller & Lux v. Kern Co. L. Co., 134 Cal. 586.

The cause of action in the case at bar is based upon a tort,

Truax v. Corrigan (CCA 9), 257 U.S. 312,

the actual damage from which is the gist of the cause of action.

Mox, Inc. v. Woods, 202 Cal. 675;
Thew Shovel Co. v. Superior Court, 35 C. A. (2d) 183;
Liquid Veneer Corp. v. Smuckler (CCA 9), 90 F. (2d) 196;
United States v. Pan American Pet. Co. (CCA 9), 55 F. (2d) 753, 758;
15 *C. J. S.* 1041.

Where a foreign corporation complies with Statutes 1917, p. 371, stating the conditions under which a foreign corporation may do business in that state, one of which conditions is that, in the event of a withdrawal from the state, service of process can be made on the officer provided by statute, these conditions are to be read into all the contracts.

Western Grocer Co. v. N. Y. Overseas Co. (D.C. Cal.), 296 F. 269;
Cohen v. Industrial Finance Corp. (D.C. N.Y.), 44 F. Supp. 489 (Nov. 1944), affirmed 144 F. (2d) 379.

In the *Cohen* case, a Virginia corporation, in 1936, surrendered authority to do business in New York and filed a certificate of withdrawal consenting that process against it in an action on obligation incurred within the state before filing of certificate might be served on Secretary of State, stockholder's derivative action for accounting with regard to alleged fraudulent and illegal transactions between the corporation and others which had taken place prior to 1936 was based on an "obligation incurred within the State" prior to 1936 so that service of process on the corporation by service upon the Secretary of State of New York was valid.

Thorne v. Grand (1941), 277 N.Y. 212, 14 N.E. (2d) 42,

to the same effect, sets out the New York statute thus:

Sec. 216, subd. 1, paragraph E, provides in respect to the certificates of a foreign corporation surrendering its authority to do business in the state:

> "That it consents that process against it in an action, or proceeding upon any liability or obligation incurred within this state before the filing of the certificate of surrender of authority, after the filing thereof, may be served upon the Secretary of State."

There a majority stockholder of a foreign corporation defendant allegedly used corporate funds of said defendant for his own benefit and wrongfully diverted assets to the use of himself and others. The Court held the cause of action an "obligation" within the statute.

Druckerman v. Barbord, 22 N.Y.S. (2d) 595;
Lessauer v. Brown, 26 N.Y.S. (2d) 722.

Turning now to the allegations of the complaint in the instant case, which contains but one cause of action, anyone can readily see from the merest cursory examination that it states, matters, in addition to others, as follows:

That petitioner is engaged in the manufacture and sale of fireworks (R. 4-6); that at all times mentioned in this complaint, the defendant (including petitioner) in the course and conduct of their respective businesses made various and numerous shipments of fireworks to jobbers and other customers in the several states of the United States. (Mary Bell's affidavit, R. 30, shows that petitioner's shipments to customers in California began before the year 1934 and continued up to and through 1938 and until the warehouse was established in California. Attention is also invited to the testimony of Clarence Grayhan, R. 67); that defendants entered into agreements and conspiracy for the purpose of eliminating competition in the jobbing and retail sales of fireworks in trade and commerce between, among, in and with the several states in the year 1935; that plaintiff was at all of the times mentioned in the complaint prior to August 1, 1938 engaged in a wholesale distribution fireworks business at San Francisco, California. (R. 7.) That plaintiff is a resident of the forum. (R. 3, par. 2.) That plaintiff was at all of said times assisted by his wife in the operation of said business; that said wife was familiar with every detail thereof; and assumed the actual management of same and carried on said business for plaintiff on those occasions when plain-

tiff was away from San Francisco interviewing his out-of-town customers, and during the time of plaintiff's disability hereinafter alleged (R. 7); that the conspiracy was being effectuated as early as January, 1936 (R. 6, par. VIII); that other overt acts were performed between January 15, 1936, and January 1, 1938, to effect the object of the conspiracy. (R. 7, par. IX.)

The overt acts alleged (R. 7-9, par. IX), "procured promises and agreements", are of such character that their effect was a *continuing* one. Promises and agreements procured on January 1, 1938, for instance, would most likely produce a continuous devastating effect for a considerable time, a period of time impossible even to approximate. Because of them respondent was unable to replenish his stock of goods. He was unable to purchase any fireworks for said business. (R. 10, par. XI.) Respondent did not have knowledge of the conspiracy or any of the reasons for the refusal to sell goods to him or for the cutting off of his credit. (R. 10, par. XII.) On January 10, 1936, respondent became mentally ill (insane) and his said wife was obliged to and did thereafter manage his said business until the said business was obliged to be closed and terminated because of stock depletion and inability to make further purchases of merchandise. (R. 11, par. XIII.) It was closed on August 1, 1938, while respondent was still under said mental disability and respondent did not recover from said disability until his release from the insane asylum on or about January 8, 1943. (R. 11, par. XIII.)

At this point in this brief, we believe it appropriate to pause momentarily to refer to a collateral matter appearing in petitioner's brief.

There appears in the record, but not as an exhibit in evidence in the case, because of the trial Court's failure to rule upon the objection interposed to petitioner's offer of the same in evidence (R. 87), the Court clerk's file in a prior action filed against petitioner herein on behalf of this respondent. This file is a part of the record herein as a consequence of a stipulation entered into by counsel. (R. 92.) The said prior action was dismissed by the District Court upon the day it received the following letter:

"May 20, 1940

Hon. Lauderback
U.S. Federal District Court
San Francisco, California

Dear Sir:

I am writing regarding Civil Suit No. 21191-L title, Giusti versus Pyrotechnic.

This suit has been on file for the past year and no interest taken by my attorneys.

I, Oscar Giusti, a citizen and plaintiff to the above entitled action, petition the Court that I wish to withdraw the above case from any further hearing, providing it remains free from prejudice to either side, and with the privilege of reopening it at some future date.

Sincerely yours,
Oscar Giusti."

Petitioner has in its petition (p. 7) and in its brief (p. 18, through adoption by reference) referred to said action apparently for the sole purpose of endeavoring to prejudice this Court into questioning or prejudging the allegations respecting respondent's insanity contained in the complaint. This file is no more relevant or material to the questions of law raised herein than would have been a similar offer on the part of respondent to have the attorneys who represented respondent in the filing of said action testify that they did not realize at the time of the filing of said action that plaintiff was not sane and that it was not until he was subsequently, by jury, declared insane that they realized what plaintiff's actual mental condition was at the time that they were so acting in his behalf and to further testify that at the time of said dismissal said attorneys were arranging with their opponent for a meeting to discuss terms of settlement of said action and had not the slightest knowledge of plaintiff's intention to write such a letter or of any dissatisfaction whatsoever on his part with reference to their services to him in said action. While we may be accused of improper conduct because of having used this comparison, nevertheless we believe we are justified in so doing in order to combat the prejudice which petitioner has thus attempted to create.

Having asserted ourselves with reference to that which we choose to designate as petitioner's collateral attack, we now refer back to the credit impairment resulting from the acts alleged in the complaint.

It is a matter of common knowledge that credit thus impaired is not easily reestablished even though the wrongful act has ceased. The impairment spreads to the most remote parts of the business world. For how many years the credit injury to respondent will continue is beyond conjecture.

The injuries to respondent therefore continued for a much longer time than petitioner would have us believe; much longer than August 1, 1938, the day it is alleged (R. 11) when respondent lost his business because of inability to make further purchases. The impairment to his credit and the refusal of petitioner, by virtue of the aforesaid agreements and conspiracies, to sell to him, was not removed on August 1, 1938, as petitioner would have us believe. Nor is there anything in the entire record to support the statement of petitioner (Pet. 8) that the conspiracy "terminated some time prior to December 1938" or that the time when petitioner's warehouse was established in California, on or about May 1, 1939, was "some time after the termination of the conspiracy". There is nothing in the record to show that the conspiracy was not in full force and effect at the time of the filing of the complaint in this action. There is nothing in the record which shows that petitioner was not engaged in absolutely the same illegal method of conducting its fireworks business after, as well as before, the time it complied with the California statutes which required it to designate a California agent for purposes of suit therein. On the contrary, the allegations of the complaint plainly indicate that the method of

doing business continued to be exactly the same after as well as before said time. (Petitioner should be reminded to correct its statement of facts in the comparison table set forth in its brief (page 37) in this respect as well as by amplifying the facts there stated so as to correspond to those shown by the record.)

Moving now to a consideration of the relation which this destruction of respondent's credit bore to the petitioner's business of manufacturing and selling fireworks, we make these deductions.

For petitioner to say that its refusal to sell to respondent, illegal though it was, did not contribute to the method, plan, operation and value of petitioner's business, would be too preposterous to be worthy of belief. No business concern would entertain such a business method unless such scheme resulted in added profits to its business. Because the illegal refusal to sell or extend credit enhanced the value of petitioner's business, the said plan or scheme was a part and parcel of and was directly connected with said business.

Thus it is to be observed (1) that the cause of action was not only a "liability and obligation incurred" within this state prior to the filing of the certificate of withdrawal, but also (2) a cause of action which "arose out of" the business which petitioner was conducting in California both before and after it filed its said designation of agent for suit purposes therein.

III.

PETITIONER'S AUTHORITIES DISTINGUISHED.

Petitioner argues that the last paragraph of Section 406(a) of the California Civil Code, supra, is a limitation upon Section 411(2) and, after quoting a passage from *Tucker v. Cave Springs Mining Corp.*, 139 C. A. 213, 217, states quite arbitrarily and with no authority to support the statement, that (Brief p. 23):

> "The history of the enactment of these sections demonstrates the express intent of the legislature to confine suits to intrastate business."

This statement is wholly without support of any kind and is nothing more than the figment of the imagination of the author.

When the *Tucker* case was decided, the last paragraph of 406(a), supra, had not as yet been enacted.

The last paragraph of Section 406(a), did not as stated by petitioner come into existence in 1933. It did not exist prior to 1937 (Cal. Stats. 1937, p. 486), which time is long after the time when the *Tucker* case was decided, nor was it in existence when Judge Hollzer decided *Miner v. United Airlines* (1936 D. C. Cal.), 16 F. Sup. 930, a case relied upon by petitioner in the Circuit Court of Appeals, and concerning which we will presently have more to say.

Tucker v. Cave Springs, 139 C. A. 213, was decided in 1934. It therefore does not hold, as petitioner implies, that 406(a) is a limitation upon Civil Code Section 411. Nor is any authority cited by petitioner,

and we know of none existing, to support his said bare assertion.

Now referring again to *Miner v. United Airlines,* supra, we observe that it was decided long before *Nierbo v. Bethlehem,* supra, wherein the United States Supreme Court overruled, at least indirectly, if not directly, the federal cases upon which Judge Hollzer based his decision. That it was decided long before *Nierbo v. Bethlehem,* is a statement which is also applicable to *Jameson v. Simond Saw,* 2 Cal. App. 582, 586, another case relied on by petitioner in the Circuit Court. Not only is the *Miner* case, supra, directly contrary to the law reaffirmed in *Nierbo v. Bethlehem,* supra, but it likewise conflicts with *Baltimore & O. R. Co. v. Harris,* supra, upon which the *Nierbo* case placed the stamp of approval and in which there was much less factual reason for holding the claim there involved to be "connected with or part of the business transacted" in the District of Columbia, than there was under the very similar claim with which Judge Hollzer was confronted in the *United Airlines* case. The *Miner* case, therefore, is not helpful to us. The *Jameson* case, supra, and *Davenport v. Superior Court,* 183 Cal. 506, as well as the other cases cited on page 14 of the petition herein, are also of no value because the section 411 there in question is not the section 411 with which we are here confronted. The subject matter of the one is entirely different from the subject matter of the other. None of these cases therefore can be used as a guide in the present one

excepting possibly to the limited extent that some of them reassert the rule that when the State Court has not already spoken that the rules of construction as laid down by the United States Supreme Court should control.

Since the California Supreme Court has not as yet spoken with reference to the construction to be placed upon California Civil Code Sections 411(2) or the last paragraph of 406(a), the law proclaimed in the *Nierbo* case, supra, should control, at least up to the time of petitioner's withdrawal from California and that the New York cases, hereinbefore cited by us, should, because of the similarity of the New York statute to our Section 411 (2), be followed in determining whether under Section 411 (2) the instant claim is "a liability or obligation incurred within" California. We believe therefore that Section 406(a) should be construed by this Court, not as a limitation upon Section 411 as applied to the facts presently before us, but as legislation which created new rights only, viz., a right to sue (after defendant foreign corporation's withdrawal) where said corporation had violated Section 405 in never having complied therewith. That such was the intention of the legislature in enacting the *last* paragraph of Section 406(a) is we believe, plainly implied in the paragraph in Section 406 which precedes it. (Pet. Brf. Appx. p. ii.)

We will now devote a moment to the initial paragraph under subtitle E of petitioner's argument (Brf. p. 41). Petitioner there states:

> "It is respectfully submitted that the type of relation between conspirators, one with the other, is not the type of *agency* referred to in the Clayton Act."

Nothing which appears in the decision of the Circuit Court gives any basis for said statement. Petitioner by making it, again shows that it has wholly misconceived the effect of the decision in the *Nierbo* case, supra. It does not, apparently, grasp the point that jurisdiction here is founded solely upon a "finding through consent" and not upon a "finding through 'doing business' ".

The theatre cases, referred to under subtitle "C" of petitioner's argument (Brf. p. 33) were cited by petitioner in the Circuit Court and discussed in the opinion of the said Court. They are distinguishable from the facts in the instant case as follows:

Westor Theatres v. Warner Brothers, 41 F. Supp. 757, differs from the instant case in that, in the former, there was no "finding by consent" and no business, other than the alleged conspiracy, was ever alleged or otherwise shown to have been done in the State of New Jersey where the action was brought. *Hanson v. Armour,* 16 F. Sup. 784, differs from the instant case in that the defendant Armour appeared generally instead of specially and attacked the sufficiency of the allegations of the complaint instead of moving to quash service of process. There was no affidavits submitted to substantiate the "finding through 'doing business' " claim and/or to supple-

ment the allegations of the complaint thereon. The Court there said at page 786:

> "The plaintiff alleges that the New Jersey Corporation is doing business in this district, but has pleaded no facts, and submitted no affidavits to substantiate the allegations. Furthermore, the defendant denies the allegation, and in an affidavit filed in support of the motion to dismiss, specifically avers in some detail that the New Jersey Corporation transacts no business here."

It is also interesting to note that the two cases cited by petitioner as aforesaid conflict even with one another. In the *Warner Brothers* case the Court said, page 761, without citing any authority in support thereof:

> "Although the phrase 'transacting business' has never been defined, one fundamental principle seems to be recognized. The acts done and which amount to transacting business must constitute some substantial part of the ordinary business of the corporation and must be continuous or at least of some duration."

This statement is directly opposed to the rule established by *Eastman Co. v. Southern Photo,* supra, as hereinbefore shown, but also as stated in the *Hanson* case. There the Court said at page 786:

> "The Delaware corporation contends that since it did only 2.49 per cent of its business in New York * * *, it has not 'transacted business' here. This small percentage, however, amounted to $4,000,000 and is simply a commentary on the defendant's size."

Thereupon the Court in the *Hanson* case proceeded to quote with approval the rule laid down in the *Eastman* case, supra.

The remainder of the cases cited by petitioner under his subtitle "C" also have no bearing upon the instant case. Since the factual situation before us shows without question that petitioner was "found" by a "finding through consent", the question of whether the "doing of business" was done through subsidiaries or in any other manner whatsoever, does not enter the picture. That question is wholly irrelevant. Nor did the Circuit Court as much as intimate that the jurisdiction was founded upon anything other than consent. That portion of the opinion which dealt with the liability of the principal for the acts of its agent was limited solely to the liability of petitioner for the damages sustained by respondent. That portion of the opinion was directed solely to replying to petitioner's contention that the damage to respondent was not a "liability incurred" in California on the part of petitioner.

The decision thereon is in keeping with well established principles of law.

McCandless v. Furlaud, 296 U.S. 140, 80 L. Ed. 121;

15 *C. J. S.* p. 1028, Sec. 18.

Having thus found that petitioner was liable for the acts of its agent in effecting the object of the conspiracy by damaging respondent as aforesaid, it remained only for the Court to examine the record to

ascertain whether petitioner had consented to be "found" in California. It is clear, therefore, that the opinion does not violate the rule that a "finding through doing business" (as distinguished from a "finding through consent") cannot be established solely by evidence that a subsidiary of defendant foreign corporation was doing the business in the forum.

It is quite evident, therefore, that the opinion of the Circuit Court is in all respects correct and entirely in accord with the law enunciated by this Court in the *Nierbo* case, supra.

CONCLUSION.

It is respectfully submitted that petitioner has failed utterly to make any showing which would entitle it to invoke the jurisdiction of this Court and its petition, therefore, should be denied.

Dated, San Francisco, California,
November 15, 1946.

Respectfully submitted,
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